

89-211

No. _____

Supreme Court, U.S.

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**IN THE
SUPREME COURT
OF THE UNITED STATES**

October Term, 1989

SOUTHERN ELECTRICAL RETIREMENT FUND,

Petitioner,

vs.

SYLVIA ANGELA CUSTER,

Respondent.

**PETITION FOR WRIT OF CERTIORARI
TO THE COURT OF APPEALS OF TENNESSEE
EASTERN SECTION**

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3702



QUESTION PRESENTED

This case involves the Employee Retirement Income Security Act (ERISA) and the interpretation of a Qualified Domestic Relations Order (QDRO), specifically the "earliest retirement age",

When can a state domestic relations Court order a pension fund to pay over to a divorced spouse a portion of the participant's anticipated pension?

The state Court held it could order payment to be made immediately and completely ignored the statutory requirements of "earliest retirement age".

PARTIES

The caption on the cover contains the names of all parties.

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OPINIONS BELOW

1. Final Judgment, Kenneth Wayne Custer vs. Sylvia Angela Custer, No. D-58541, Hamilton County Circuit Court, July 13, 1987. Set out verbatim at pages 13-14 of the Appendix.

2. Opinion, Court of Appeals of Tennessee, Eastern Section, Kenneth Wayne Custer vs. Sylvia Angela Custer vs. Southern Electrical Retirement Fund, C.A. No. 822, December 17, 1988, set out verbatim at pages 1-7 of the Appendix.

JURISDICTIONAL STATEMENT

The Tennessee Court of Appeals entered its Decree on December 27, 1988, and is set out at A. 8-9. A Petition to Reconsider was duly filed on January 13, 1989 (set out verbatim at A. 10). The Motion was denied without opinion on February 6, 1989. (A. 11).

An Application for Permission to Appeal to the Supreme Court of Tennessee was timely filed and that Court, without opinion, denied the same on May 8, 1989 (A.12), and this Petition to this Court is timely filed.

(ERISA, 29 U.S.C. § 1132(a), provides for exclusive or concurrent jurisdiction of the Federal Courts with the state Courts on all matters pertaining to this statute. ERISA, 29 U.S.C. § 1143(a), provides that the federal law supersedes all state law.

The jurisdiction of this Court rests upon 28 U.S.C. §1257(a).

The pertinent portion of ERISA, 29 U.S.C. § 1056(d), is as follows:

§ 1056. Form and payment of benefits

(a)-(c) [Unchanged]

(d)

Assignment or alienation of plan benefits. (1), (2) [Unchanged]

(3) (A) Paragraph (1) shall apply to the creation, assignment, or recognition of a right to any benefit payable with respect to a participant pursuant to a domestic relations order, except that paragraph (1) shall not apply if the order is determined to be a qualified domestic relations order. Each pension plan shall provide for the payment of benefits in accordance with the applicable requirements of any qualified domestic relations order.

(B) For purposes of this paragraph--

(i) the term "qualified domestic relations order" means a domestic relations order--

(I) which creates or recognizes the existence of an alternate payee's right to, or assigns to an alternate payee the right to, receive all or a portion of the benefits payable with respect to a participant under a plan, and
(II) with respect to which the requirements of subparagraphs (C) and (D) are met, and

(ii) the term "domestic relations order" means any judgment, decree, or order (including approval of a property settlement agreement) which--

(I) relates to the provision of child support, alimony payments, or marital property rights to a spouse, former spouse, child, or other dependent of a participant and
(II) is made pursuant to a State domestic relations law (including a community property law).

(C) A domestic relations order meets the requirements of this subparagraph only if such order clearly specifies--

(i) the name and the last known mailing address (if any) of the participant and the name and mailing address of each alternate payee covered by the order,

(ii) the amount or percentage of the participant's benefits to be paid by the plan to each such alternate payee, or the manner in which such amount or percentage is to be determined.

(iii) the number of payments or period to which such order applies, and

(iv) each plan to which such order applies.

(D) A domestic relations order meets the requirements of this subparagraph only if such order--

(i) does not require a plan to provide any type or form of benefit, or any option, not otherwise provided under the plan,

(ii) does not require the plan to provide increased benefits (determined on the basis of actuarial value), and

(iii) does not require the payment of benefits to an alternate payee which are required to be paid to another alternate payee under another order previously determined to be a qualified domestic relations order.

(E) (i) A domestic relations order shall not be treated as failing to meet the requirements of clause

(i) of subparagraph (D) solely because such order requires that payment of benefits be made to an alternate payee--

(I) on or in the case of any payment before a participant has separated from service, after the date on which the participant attains (or would have attained) the earliest retirement age,

(II) as if the participant had retired on the date on which such payment is to begin under such order (but taking into account only the present value of benefits actually accrued and not taking into account the present value of any employer subsidy for early retirement), and

(III) in any form in which such benefits may be paid under the plan to the participant (other than in the form of a joint and survivor annuity with respect to the alternate payee and his or her subsequent spouse).

For purposes of subclause (II), the interest rate assumption used in determining the present value shall be the interest rate specified in the plan or, if no rate is specified, 5 percent.

(ii) For purposes of this subparagraph, the term "earliest retirement age" means the earlier of --

(I) the date on which the participant is entitled to a distribution under the plan, or

(II) the later of the date of the participant attains age 50 or the earliest date on which the participant could begin receiving benefits under the plan if the participant separated from service.

STATEMENT OF THE CASE

This case was appealed upon the Technical Record, along with one exhibit, the Summary Plan of the Petitioner, Southern Electrical Retirement Fund, hereinafter referred to as SERF. The facts are undisputed.

Southern Electrical Retirement Fund (SERF) is a large pension or retirement fund which covers electricians working in the geographical jurisdictions of the unions shown at the beginning of the Summary Plan, Exhibit "1" to the Technical Record. It covers electricians working under collective bargaining contracts from Richmond, Virginia, throughout the panhandle of Florida, as well as all construction electricians working for and in the seven state area of the TVA. SERF has its main office in Chattanooga, Tennessee.

Since this case was appealed on the Technical Record, along with one Exhibit, the Statement of the Case is relatively simple, and only

one question of law is involved.

The Plaintiff, Kenneth Wayne Custer, sued his wife, Sylvia Angela Custer, for divorce based upon irreconcilable differences (no fault). The parties have two (2) small children. The parties were represented by counsel and eventually entered into a Property Settlement which the Trial Court, Robert M. Summitt, Judge, approved, and adopted on July 13, 1987. (TR 1-2) (A 13-14).

At the time of the Property Settlement, Wayne Custer, age 32, had accumulated the sum of \$22,473.00 in the Pension Fund. In the Property Settlement, Wayne Custer, age 32, had accumulated the sum of \$22,473.00 in the Pension Fund. In the Property Settlement (TR 3-6) (A-15-18), Mrs. Sylvia Angela Custer was awarded one-half (1/2) of that amount, or \$11,236.55, which SERF was ordered to pay as soon as administratively possible.

The Summary Plan description of SERF, hereinafter referred to as the Plan, shows the Fund is a large multi-employer, multi-employee retirement fund. It operates a defined contribution benefit plan as opposed to a defined benefit (Exhibit 1, p.26). Essential requirements of ERISA are set forth in the Plan (Exhibit 1, p. 23-29). The Fund has tax free status under federal law as set forth in Paragraph 6.1, p. 42.

The divorcing parties knew SERF was subject to the Retirement Equity Act of 1984, Public Law 98-397. The parties in their Agreed Settlement stated the Court had determined this to be true (TR 6) (A 16). The Settlement stated the parties considered this portion of the Agreement a QDRO, and the Court so found. On October 1, 1987, after the Divorce Decree was final, Mrs. Custer filed a motion to make SERF a party to this litigation, which the Court approved (TR 11). On November 3, 1987, a Petition to Show Cause was filed by Mrs. Custer for failure of SERF to disburse the sum of \$11,236.55 to her (TR 12-13). On November 9, 1987,

SERF filed a Motion to Quash or Dismiss the Petition to Show Cause. This was the first pleading of SERF and raises the federal question for the first time. This motion is set out verbatim on p. 18-19 of the Appendix.

SERF contended the Domestic Relations Order was not qualified, as the participant, Mr. Custer, was only thirty-two (32) years of age and not eligible for benefits until reaching the age of fifty-five (55), under the SERF plan or fifty (50) under ERISA. The motion was overruled without opinion on January 5, 1988 (A 20-21).

On January 13, 1988, SERF filed a Motion to Reconsider in the Trial Court (TR 20). This pleading raised the Federal question for the second time. The Court overruled this motion on February 1, 1988 (TR 21) (A 21-22).

On July 7, 1988, the Appellant, SERF, and Appellee, Sylvia Custer, entered into an Agreed Order approved by the Appellate Judge, Hershall Franks, providing for supplemental contents of the Technical Record and the Summary Plan description of SERF to be filed as Joint Exhibit "1".

An Appeal of Right was taken to the Tennessee Court of Appeals and raised two questions, the primary issue being an interpretation of "earliest retirement age", identical to the federal question raised in the Trial Court. The Appeals Court, after oral argument, later rendered its opinion on December 27, 1988, and shows the contention was considered (appendix p. 2). The Appeals Court found that an QDRO is not contingent upon the age of the participant's spouse (it is assumed the word "spouse" was inadvertently entered), and the Trial Court could order payment immediately. Costs were assessed against SERF.

A Motion to Reconsider or Rehearing with Brief, was filed on January 13, 1989, raising the earliest retirement age question again (A 10). This motion was overruled without opinion on February 6, 1989 (A 11).

A timely Application for Permission to Appeal to the Tennessee Supreme Court was made, and raised the same federal question. The Tennessee Supreme Court, without opinion, denied permission to appeal on May 8, 1989 (A 12). The Supreme Court of Tennessee is the highest court within this state in which Petitioner could seek relief.

ARGUMENT

Petitioner agrees with the history of a QDRO as stated by the Tennessee Appellate Court; however, the exception for domestic relations orders arose only in community property states. Among those cases cited by the Petitioner to the Tennessee Appellate Court for a history of QDRO in addition to Smith vs Mirman, 4th Cir., 749 F.2d 181, was Williams vs. Williams, CA Court Appeal, 1985, 163 Cal.App.3d 753, 209 Cal. Reports 753 (West). In the case of Operating Engineers Local 428 Pension Fund vs Zamborskay, 9th Cir. 1981, 650 F.2d 196, the court at p.201 stated: "The main purpose of Section 206 is to insure the employees' accrued benefits are actually available for retirement purposes."

All cases, both state and federal, appear to hold a QDRO to be valid, must be in "pay status." Monsanto vs. Ford, 534 F.Supp. 51 which Smith vs. Mirman, cited, is a complete brief on the subject of "pay status" as the law was prior to the 1984 statutory amendments. At page 53, the District Court stated:

The Internal Revenue Service, in Revenue Ruling 80-27, IRB 1980-4,8, has warned that an alienation of benefits not in pay status for marital support obligations may cause a qualified employee benefit plan to lose its qualified status. See also, IRS Letter Rulings 8010051 and 79390026. Loss of qualified status to the employee benefit plans could subject both Monsanto and the participating employees to substantial immediate tax liability on the benefits accrued for those employees.

A court may not rewrite the contractual obligations of the parties by compelling the employer to make a premature distribution to an employee or his spouse of funds held for the benefits of the employees. Such action would be discriminatory as against other plan participants.

The above IRS rulings are still in effect. Based upon the interpretation of the courts, which Congress obviously approved, the 1986 amendments to ERISA were passed, specifically spelling out "pay status" by subsection "earliest retirement age."

The Court of Appeals took subsection 29 U.S.C. § 1056(d)

(3) (E) (i) out of context and seemingly does not consider the next subsection (ii). These subsections should be read together as follows:

(E) (i) A domestic relations order shall not be treated as failing to meet the requirements of clause (i) of subparagraph (D), solely because such order requires that payment of benefits be made to an alternate payee -

(I) in the case of any payment before a participant has separated from service, on or after the date on which the participant attains (or would have attained) the earliest retirement age,

(II) as if the participant had retired on the date on which such payment is to begin under such order

The Petitioner has underscored the section referring to the "earliest retirement age". The next subsection of "E" is as follows:

(ii) For purposes of this subparagraph, the term 'earliest retirement age' means the earlier of -

(I) the date on which the participant is entitled to a distribution under the plan, or

(II) the latter of the date the participant attains age 50 or the earliest date on which participant could begin receiving benefits under the plan if the participant separated from service.

The identical sections of ERISA appear in the Internal Revenue Code of 1988 under different numbers but with headings.

For example, (E) (i) above quoted is a section 414(p) (4) (A), with the heading of "Exception for certain payments made after earliest retirement age."

The next subsection (ii) is section 414 (p) (4) (B) with the heading of "Earliest retirement age."

Under SERF's plan, Exhibit I to the Technical Record, the normal age for retirement is fifty-five (55) (p. 10 of Plan).

A participant could receive benefits earlier under any of the following events:

- (1) Separation from service (p. 10 of Plan).
- (2) Disability retirement (p. 12 of Plan).
- (3) Dies before qualifying for normal or disability benefits (p.12 of Plan).

There is no contention Mr. Custer met any of the above conditions. That leaves age 50 as the earliest retirement date.

The Tennessee Court Of Appeals relies on Section (E) (i) (II) of ERISA. That section had to be placed in the Statute, as few electricians, or anyone else, retires at the age of fifty.

SERF contends the interpretation of its plan under ERISA is not unreasonable and that is all that is required under Court review standards. In fact, SERF is of the opinion it is the only reasonable interpretation.

Since the latest amendments to the QDRO sections, the following state courts have recognized the "earliest retirement age."

The Alaska Supreme Court in Laing vs. Laing (1987), 741 p.2d 649, held that when the employee spouse's pension vests and matures, the administrator could make payments under a QDRO. The Court stated at p. 658:

"In certain circumstances, REACT allows the non-employee spouse to convert his or her share of the benefits to pay status independently of the employee spouse." (29 U.S.C. § 1056 (d) (3) (E)).

In the California case, In re Marriage of Baker (1988), 257 Cal.Rptr. 126, 204 Cal. App.3d 206, the court held a former spouse was entitled to begin receiving payments of his or her interest in the plan when the employee became eligible to retire, even though the employee continued to work, citing 29 U.S.C. § 1056 (d) (3) (E).

In the Minnesota case of In re Marriage of Edward V. Fastner vs. Patricia Fastner (1988), 427 N.W. 2d 691, the Court refers to 29 U.S.C. § 1056(d) (3) (E) (i) (ii), in footnote 4 at page 698.

It is respectfully submitted, the Tennessee Court of Appeals just plainly misinterpreted the QDRO sections of ERISA. Why did the Tennessee Supreme Court refuse to review the decision? It would be inappropriate for SERF's attorney, the writer herein, to venture a guess. It can be pointed out that this attorney is going through the same frustration with the Tennessee Court as he did with preemption under Taft-Hartley over thirty years ago. Then the Tennessee Courts wished to apply state labor law to interstate commerce. This writer's first case was summarily reversed. Kerrigan Iron Works vs. Cook Truck Lines (1957), 359 U.S. 236. The Tennessee Courts did not recognize the decision, and a second case had to be taken to this Court. Liner v. Jafco, Inc. (1964), 375 U.S. 301. Again, this Court reversed. The same frustration as stated, now extends to domestic relations.

If this Court does not reverse, SERF will have no alternative but to comply with the Trial Court's Order, just like Petitioner was a bank and had one of its accounts attached. The Tennessee decision has gained considerable notoriety and is cited in Westlaw, 1988 WL 138209.

CONCLUSION

In the event this case is not summarily reversed, Petitioner prays this Petition for Writ of Certiorari, and an oral hearing be granted.

Respectfully submitted,

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APPENDIX

(Filed December 27, 1988)

In The Court of Appeals of Tennessee,
Eastern Section

Kenneth Wayne Custer,	* C.A. No. 822
Plaintiff,	* HONORABLE ROBERT M. SUMMITT,
	* JUDGE
vs.	*
SYLVIA ANGELA CUSTER,	*
Defendant/Appellee	*
vs.	*
SOUTHERN ELECTRICAL	*
RETIREMENT FUND,*	*
	*
Defendant/Appellant	*
For Defendant/Appellant:	S. Del Fuston, Chattanooga, Tennessee
For Defendant/Appellee:	Michael E. Richardson, Patrick, Beard & Richardson, P.C. of Chattanooga Tennessee

OPINION

Southern Electric Retirement Fund ("Fund"), appeals the Chancellor's judgment ordering payment of one-half of the husband's pension to the wife.

Kenneth Wayne Custer, aged 32, and Sylvia Angela Custer were divorced on July 30, 1987. The divorce decree approved a property settlement

agreement which awarded \$11,236.55 of the husband's pension to the wife. When Fund refused to disburse the money, the wife filed a petition to show cause.

Fund moved to dismiss the petition to show cause, on grounds the Employee Retirement Income Security Act ("ERISA") prohibited distribution of Fund proceeds. The Court overruled Fund's motion and ordered it to immediately disburse the money to the wife. Fund appealed.

On appeal, Fund argues that employees participating in a retirement plan governed by ERISA, a participant may not receive any benefits until age 55 under the plan; therefore, the earliest effective date for a QDRO, and the earliest date on which the wife could receive her share of the benefits, would be the husband's 55th birthday. Fund points to the following language in ERISA to support its argument:

Each pension plan shall provide that benefits provided under the plan may not be assigned or alienated.

....

... the term "earliest retirement age" means the earlier of--

(I) the date on which the participant is entitled to a distribution under the plan, or

(II) the later of the date of [sic] the participant attains age 50 or the earliest date on which the participant could begin receiving benefits under the plan if the participant separated from service.

29 U.S.C. § 1056(d) (1), 3(E) (ii) (Supp. 1988).

Fund also contends that the Trial Court erred in ordering immediate disbursement of the money in violation of ERISA's prescribed 18-month time frame for the plan administrator to determine whether the divorce decree met the requirements of a QDRO. For the following reasons, we affirm the Trial Court's Order.

Since the issues involve questions of law, our scope of review is de novo with no presumption of correctness for the Trial

Court's conclusion of law. Barnett vs. Watco, Inc., 682 S.W.2d 212, 218 (Tenn. Ct. App. 1984); Billington vs. Crowder, 553 S.W.2d 590 (Tenn. Ct. App. 1977).

A. HISTORY OF ERISA

ERISA was enacted to protect pension plan participants and their beneficiaries. Smith vs. Mirman, 749 F.2d 181, 182 (4th Cir. 1984). According to the legislative history, the "most important purpose" of ERISA is to "assure American workers that they may look forward with anticipation to a retirement with the financial security and dignity, and without fear that this period of life will be lacking in the necessities to sustain them as human beings within our society." Id., citing S. Rep. No. 93-127, 93d Cong., 2d Sess. (1974), reprinted in U.S. Cong. Code & Admin. News, p. 4734 (1974).

However, Courts divided on the issue of whether the accrued benefits in ERISA plans could be paid to dependents, including former spouses, before a plan's participant retired. Courts allowing disbursements from the fund prior to the participant's retirement did so on the theory that, although Congress pre-empted state laws to the contrary and although § 1056(d) (1) expressly provided that plan benefits "may not be assigned or alienated," the basic premise of the Act was to provide protection for the funds from outside creditors, and that dependents, including former spouses, were not third party creditors.

Courts which strictly construed the anti-alienation provision distinguished between pension plans in pay status, in which the participants were already receiving benefits from the plan, and those not in pay status. These Courts observed that most awards or disbursements under the plan were granted to spouses of retired participants. The Court also focused

upon the contractual nature of employee benefits, and observed that Courts "may not rewrite the contractual obligations of the parties by compelling the employer to make a premature distribution to an employee or his spouse of funds held for the benefits of the employees." Monsanto, 534 F.Supp. 51, 53 (E.D. Mo. 1981).

Recognizing the conflicts between Courts construing the anti-alienation provision of ERISA, Congress added paragraph (3) to 29 U.S.C. § 1056(d).¹ The new section excepted "qualified

¹ [The anti-alienation provision] shall not apply if the Order is determined to be a qualified domestic relations order. Each pension plan shall provide for the payment of benefits in accordance with the applicable requirements of any qualified domestic relations order.

(B) For purposes of this paragraph—

(i) the term "qualified domestic relations order" means a domestic relations order—

(I) which creates or recognizes the existence of an alternate payee's right to, or assigns to an alternate payee the right to, receive all or a portion of the benefits payable with respect to a participant under a plan,

....

(ii) the term "domestic relations order" means any judgment, decree, or order (including approval of a property settlement agreement which—

(I) relates to the provision of . . . marital property rights to a spouse, [or] former spouse, . . . and

(II) is made pursuant to a State domestic relations law (including a community property law)

....

(D) A domestic relations order meets the requirements of this subparagraph only if such order—

(i) does not require a plan to provide any type or form of benefit, or any option, not otherwise provided under the plan,

...

domestic relations orders" from the provision prohibiting alienation of benefits. A QDRO "creates or recognizes the existence of an alternate payee's right to . . . receive all or a portion of the benefits payable with respect to a participant under a plan." Additionally, the order must specify the amount or percentage of the benefits payable to the alternate payee (or the manner in which the amount is to be determined), and the plan to which the order applies. 29 U.S.C. § 1056 (d) (3) (B), (C) (1985 & Supp. 1988). The order may not require the plan to provide a type or form of benefit or option not provided under the plan. However, the Act specifically provides that if an order requires payment of benefits to an alternate payee "as if the participant had retired on the date on which such payment is to begin under the order," it would meet the requirements of that clause.

According to the legislative history of the Retirement Equity Act of 1984, the Senate Report noted that ERISA was amended to

provide for greater equity under private pension plans for workers and their spouses . . . by taking into account changes in work patterns, the status of marriage as an economic partnership, and the substantial contribution to that partnership of spouses who work both in and outside the home.

(E) (i) In the case of any payment before a participant has separated from service, a domestic relations order shall not be treated as failing to meet the requirements of clause (i) of subparagraph (D) solely because such order requires that payment of benefits be made to an alternate payee--

(I) on or after the date on which the participant attains (or would have attained) the earliest retirement age,

(II) as if the participant had retired on the date on which such payment is to begin under such order (but taking into account only the present value of benefits actually accrued . . .

29 U.S.C. § 1056 (d) (3) (A); (B) (i) (I), (ii) (I) (II); (D) (i); (E) (i) (I) (II) (1985 & Supp. 1988).

S. Rep. No. 575, 98th Cong., 2d Sess. (1984), reprinted in 1984 U.S. Code Cong. & Admn. News 2547. The Report observed that "the assignment of [an] alternate payee's rights to the benefits is not considered an assignment or alienation of benefits under the plan if and only if the order is a qualified domestic relations order," and that state law providing these rights under a QDRO would be exempt from federal pre-emption. Id at 2565.

The divorce judgment of July 30, 1987, contained the following provisions:

(a) Application of Retirement Equity Act of 1984. The Court determines that pursuant to the Retirement Equity Act of 1984 (Act) Public Law 98-397, Section 204, \$11,236.55 of Kenneth Wayne Custer's retirement benefits under the Southern Electrical Retirement Fund may be disbursed and distributed to Sylvia Angela Custer pursuant to this order as soon as administratively possible in the form provided in such respective plan.

(b) Effective Date. This order is entered as a Qualified Domestic Relations Order, as that term is used in the Act.

in addition to other provisions which are required by ERISA. Our review of the divorce decree reflects that it complies in every respect with ERISA.

Thus, contrary to Fund's argument, disbursement of retirement plan funds to a non-participant spouse in compliance with a QDRO is not contingent upon the age of the participant spouse at the time the funds are to be distributed. Since the Custer's divorce decree is a "Qualified Domestic Relations Order" as defined by ERISA in 29 U.S.C. § 1056 (d) (3), the wife may receive the fund awarded to her by the Court's decree "as if the participant [the husband] had retired on the date on which such payment is to begin." 29 U.S.C. § 1056 (d) (3) (E) (i) (II) (1985).

B. 18-MONTH DETERMINATION PERIOD

Fund argues that the statute, 29 U.S.C. § 1056, provides an 18-month period for the plan administrator to review the Court order to determine if it meets the requirements of a QDRO and that time has not

elapsed. The applicable section of the statute provides that a plan administrator shall determine whether the order is a QDRO within a "reasonable period" after receiving the order. 29 U.S.C. § 1056 (d) (3) (G).² The term "reasonable period" is not defined; however, the statute also recognizes that others may make that determination, including a "court of competent jurisdiction." 29 U.S.C. § 1056 (d) (3) (H). In this case, a court of competent jurisdiction found that the order met the requirements of a QDRO, "the plan administrator shall pay the segregated amounts." Accordingly, we find Fund's argument without merit.

For the foregoing reasons, we affirm the judgment of the Trial Court. Costs of this appeal are taxed to the Appellant.

E. Riley Anderson,

Judge

CONCUR:

Clifford E. Sanders, P.J. [E.S.]

Hershel P. Franks, J.

² (G)

(II) within a reasonable period after receipt of such order, the plan administrator shall determine whether such order is a qualified domestic relations order and notify the participant and each alternate payee of such determination.

... (H) (i) During any period in which the issue of whether a domestic relations order is a qualified domestic relations order is being determined (by the plan administrator, by a Court of competent jurisdiction, or otherwise), the plan administrator shall segregate . . . the amounts which would have been payable to the alternate payee

(ii) If within 18 months the order . . . is determined to be a qualified domestic relations order, the plan administrator shall pay the segregated amounts . . . to the person . . .

29 U.S.C. § 1056 (d) (3) (G) (i) (ii) (1985).

IN THE COURT OF APPEALS OF TENNESSEE

EASTERN SECTION

(Filed December 27, 1988)

Kenneth Wayne Custer,	* C.A. No. 822
Plaintiff,	*
vs.	*
SYLVIA ANGELA CUSTER,	* HONORABLE ROBERT M. SUMMITT,
Defendant/Appellee,	* JUDGE
vs.	*
	*
SOUTHERN ELECTRICAL	*
RETIREMENT FUND,	*
	*
Defendant/Appellant	*

DECREE

This cause coming on to be heard upon a transcript of the record from the Circuit court of Hamilton County, and briefs of the parties, upon consideration whereof the court is of the opinion that in the judgment of the Court below there is no error.

It is therefore ordered and adjudged by the Court that the judgment of the Court below be affirmed in accordance with the opinion of this Court, and that this case be and hereby is remanded to the Circuit Court of Hamilton County for such further proceedings as may be necessary consistent with the opinion of this Court, a copy of which shall accompany the mandate upon the remand to the Court below.

The costs incurred on appeal are adjudged in this Court against defendant-appellant, Southern Electrical Retirement Fund, and surety, S. Del Fuston, Attorney, for which let execution issue. This cause is remanded to the Trial Court aforesaid for the collection of the costs adjudged therein, in the manner provided by law.

Anderson, J.

Sanders, P.J.

Franks, J.

IN THE COURT OF APPEALS OF TENNESSEE

EASTERN SECTION

(Filed January 13, 1989)(?)

Kenneth Wayne Custer,	* C.A. No. 822
Plaintiff,	*
vs.	*
SYLVIA ANGELA CUSTER,	* HONORABLE ROBERT M. SUMMITT,
Defendant/Appellee,	* JUDGE
vs.	*
SOUTHERN ELECTRICAL	*
RETIREMENT FUND,	*
Defendant/Appellant	*

MOTION OF APPELLANT

TO RECONSIDER OR REHEARING

In accordance with Rule 39 of the Tennessee Rules of Appellant Procedure, the appellant moves the Court to reconsider or rehearing upon the following grounds:

1. The Court's Decree with Opinion is in conflict with the Federal Statute, Employee Retirement Income Security Act of 1974 as amended (ERISA) 29 U.S.C. § 1001, et seq.
2. Specifically a retirement or pension fund as defined by ERISA cannot make distribution under a Qualified Domestic Relations Order (QDRO) except under Section 29 U.S.C. § 1056 (E) until participant is entitled to a distribution or the participant reaches the age fifty (50).

A brief in support of this Motion is attached.

S. Del Fuston

IN THE COURT OF APPEALS OF TENNESSEE

EASTERN SECTION

(Filed February 6, 1989)

Kenneth Wayne Custer,

Plaintiff,

vs.

SYLVIA ANGELA CUSTER,

Defendant/Appellee,

vs.

SOUTHERN ELECTRICAL

RETIREMENT FUND,

Defendant/Appellant

* C.A. No. 822

*

*

* HONORABLE ROBERT M. SUMMITT,

* JUDGE

*

*

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*

*

*

ORDER ON PETITION TO RECONSIDER OR REHEAR

Defendant-Appellant's Petition to Reconsider or Rehear,
upon due consideration, is respectfully denied.

This the _____ day of January, 1989

E. Riley Anderson, J.

Clifford E. Sanders, P.J. [E.S.]

Hershel P. Franks, J.

IN THE SUPREME COURT OF TENNESSEE

AT KNOXVILLE

(Filed May 8, 1989)

Kenneth Wayne Custer,

Plaintiff,

vs.

SYLVIA ANGELA CUSTER,

Defendant/Appellee,

vs.

SOUTHERN ELECTRICAL

RETIREMENT FUND,

Defendant/Appellant

* C.A. No. 822

*

*

* HONORABLE ROBERT M. SUMMITT,

* JUDGE

*

*

*

*

*

*

ORDER

On considering the application for permission to appeal and
briefs filed in this case, and the entire record, the application of Southern
Electrical Retirement Fund is denied at cost of the appellant.

PER CURIAM

USCOURT/5/dg

7/2/89

(Filed July 13, 1987)

(TR 1-2)

KENNETH WAYNE CUSTER,	* D-58541
Plaintiff,	* IN THE CIRCUIT COURT OF
vs.	* HAMILTON COUNTY, TENNESSEE
SYLVIA ANGELA CUSTER,	* DIVISION I
Defendant.	*

FINAL JUDGMENT

This cause came on to be further and finally heard on the 13th day of July, 1987, before the Honorable Robert Summitt, Judge of Division I of the Circuit Court, Hamilton County, Tennessee. The cause was heard upon the complaint filed by the plaintiff alleging that the parties have irreconcilable differences, the answer of the Defendant admitting that the parties have irreconcilable differences, the testimony of parties heard in open court and the entire record of this cause, from all of which the Court finds that irreconcilable differences do exist between the parties that cannot be resolved.

The Court find that the parties have made adequate and sufficient provision by written settlement agreement for the equitable settlement of any property rights between the parties and the Court further finds that the parties have made adequate and sufficient provision for the care and custody of the parties two minor children. A copy of said Property Settlement Agreement is attached hereto and marked Exhibit 1 and incorporated herein by reference, having the same full force and effect as if set

out herein verbatim.

It is hereby ordered and adjudged that:

1. The bonds of matrimony now uniting the parties are hereby dissolved, and each of the parties is hereby restored to all the rights and privileges of unmarried persons.
2. The Court approves and adopts the settlement agreement heretofore entered into between the parties which is incorporated into this judgment.
3. Plaintiff Kenneth Wayne Custer shall pay the attorney's fees of his respective attorney, Robert Hale, as well as paying the attorney's fees incurred by the Defendant in this cause with the law firm of Patrick, Beard & Richardson, P.C.
4. All Court costs are adjudged against the plaintiff, for which execution may issue if necessary.

ENTER this the 13th day of July, 1987.

Judge Robert Summitt

APPROVED FOR ENTRY:

ROBERT D. HALE

MICHAEL E. RICHARDSON

(Filed July 13, 1987)

(TR 1-2)

KENNETH WAYNE CUSTER, * D-58541

Plaintiff,

vs.

SYLVIA ANGELA CUSTER,

Defendant.

* IN THE CIRCUIT COURT OF

* HAMILTON COUNTY, TENNESSEE

* DIVISION I

*

PROPERTY SETTLEMENT AGREEMENT

This Agreement is made between Kenneth Wayne Custer, hereinafter referred to as "Husband," and Sylvia Angela Custer, hereinafter referred to as "Wife"

WHEREAS, the parties hereto were married on April 25, 1981, and there have been two minor children born of this union, namely, Kenneth Wayne Custer, Jr., born October 24, 1981 and Kory Wade Custer, born December 30, 1986; and

WHEREAS, certain differences and difficulties have arisen between the parties in the above-styled divorce action in which irreconcilable differences is alleged as ground for divorce and a divorce action has been instituted in the Circuit Court of Hamilton County, Tennessee; and

WHEREAS, the parties desire to enter into an agreement with regard to their respective rights and obligations arising out of their marital relationship in a mutually acceptable manner, such that said divorce action shall proceed on irreconcilable differences grounds;

NOW, THEREFORE, in consideration of the premises and mutual

covenants and agreements hereinafter contained, the parties do agree as follows:

* * *

11. Qualified Domestic Relations Order. The Husband currently has certain pension benefits in the Southern Electrical Retirement Fund. Pursuant to the parties' division of their marital property rights and interest, Wife Sylvia Angela Custer is hereby given judgment against Kenneth Wayne Custer in the sum of \$11, 236.55, which represents one-half of the amount the Husband's Pension Fund Interest has increased during the term of the parties' marriage. In order to effectuate the Wife's collection of this judgment amount, the Court orders as follows:

(a) Application of Retirement Equity Act of 1984. The Court determines that pursuant to the Retirement Equity Act of 1984 (Act) Public Law 98-397, Section 204, \$11,236.55 of Kenneth Wayne Custer's retirement benefits under the Southern Electrical Retirement Fund may be disbursed and distributed to Sylvia Angela Custer pursuant to this order as soon as administratively possible in the form provided in such respective plan.

(b) Effective Date. This order is entered as a Qualified Domestic Relations Order, as that term is used in the Act.

(c) Name and Mailing Address of Participant. Pursuant to Section 204 of the Act, the Court finds that the name and mailing address of the participant in the Southern Electrical Retirement Fund is Kenneth Wayne Custer with his last known address being 6517 Lynn Road, Harrison, Tennessee.

(d) Name and Mailing Address of Alternate Payee. Pursuant to Section 204 of the Act, the Court finds that the name and mailing address of the alternate payee for the Southern Electrical Retirement Fund is Sylvia

Angela Custer, 6517 Lynn Road, Harrison, Tennessee.

(e) Southern Electrical Retirement Fund Pension Plan. Pursuant to T.C.A. § 36-4-121, and the Retirement Equity Act of 1984, the Court determines that all vested benefits to which Kenneth Wayne Custer is entitled as a participant under the Southern Electrical Retirement Fund is marital property subject to equitable division by this Court and further is subject to application by this Court to satisfy the parties' division of marital assets and adjustment of marital rights. As part of the overall equitable division of assets entered into in this cause, the Court awards to Sylvia Angela Custer, as alternate payee, the right to receive \$11,236.55 of those vested benefits to which Kenneth Wayne Custer is entitled as a participant under the Southern Electrical Retirement Fund. Such benefits in the sum of \$11,236.55 shall be distributed to Sylvia Angela Custer as quickly as administratively possible following July 6, 1987. The distribution to Sylvia Angela Custer shall be in a lump sum payment or other form as provided in the Southern Electrical Retirement Fund.

(f) This Qualified Domestic Relations Order does not require the Southern Electrical Retirement Fund to provide any type or form of benefit not otherwise provided under the Southern Electrical Retirement Fund; not does this Qualified Domestic Relations Order require the Southern Electrical Retirement Fund to Provide increased benefits to the participant or any alternate payee; nor does this Qualified Domestic Relations Order require that payment to an alternate payee of plan benefits which are required to be paid to another alternate payee under another order previously determined to be a qualified domestic relations order.

IN WITNESS WHEREOF, the parties have signed and acknowledged this agreement.

Kenneth Wayne Custer
Sylvia Angela Custer

* * *

KENNETH WAYNE CUSTER *D-58541

Plaintiff,

vs.

SYLVIA ANGELA CUSTER

Defendant.

* IN THE CIRCUIT COURT OF

* HAMILTON COUNTY, TENNESSEE

* DIVISION I

MOTION TO QUASH OR DISMISS

Pursuant to Section 60.02 of the Tennessee Rules of Court, Bill Lowery and the Southern Electrical Retirement Fund (SERF) move the Court to dismiss the Petition to Show Cause for the following reasons:

I.

The divorce statistics show that Kenneth Wayne Custer, is age Thirty-Two (32). SERF requires the participant, Kenneth Wayne Custer, to be fifty-five (55) and leaves the electrical trade to be eligible for normal retirement.

II.

To be eligible for benefits under a Qualified Domestic Relations Order, the Employee Retirement Incomes Security Act, 29 U.S.C § 1056 (D)

(ii) (II), the earliest retirement age means of the earlier of:

1. The date on which the participant is entitled to a distribution under the plan, or

2. The later of: (a) the date the participant attains age fifty (50), or (b) the earliest date on which the participant could begin receiving benefits under the plan if he separated from service.

The Internal Revenue Code is the same. See Section 414(p) (4) (B) (II) (I and II). For an explanation of same see attached copy of QDRO analysis set forth in the Federal Tax Coordinator 2d.

III.

Kenneth Wayne Custer is not fifty (50) years of age nor has he left his Electrical trade, therefore, the petition should be dismissed.

IV.

A retirement trust fund has the right to take eighteen (18) months to determine if the domestic order is a Qualified Domestic Relations Order. ERISA, 29 U.S.C. § 1056(D) (H) (2). The Internal Revenue Code is the same.

V.

Bill Lowery is merely a Trustee of SERF. There are approximately forty-eight (48) trustees. He would have no authority to order any payment from the fund assets. The agent for service of Legal Process is S. Del Fuston as set forth on Page 20 of the Summary Plan. Any process served on S. Del Fuston would be replied to by S. Del Fuston or the administrator of the plan.

WHEREFORE, it is prayed the Petition for Contempt be dismissed.

S. Del Fuston

(Filed January 5, 1988)

(T.R. 18)

KENNETH WAYNE CUSTER, * D-58541

*

Plaintiff,

vs.

* IN THE CIRCUIT COURT OF

* HAMILTON COUNTY,

* TENNESSEE

SYLVIA ANGELA CUSTER, * DIVISION I

*

Defendant

*

ORDER

This cause came before this Honorable Court on the 30th day of November, 1987, upon Sylvia Angela Custer's Petition to Show Cause why the Southern Electrical Retirement Fund should not comply with the Qualified Domestic Relations Order heretofore entered in this Court which pertains to certain retirement benefits which Kenneth Custer has in the Southern Electrical Retirement Fund; the matter was further before the Court upon the Motion to Quash or Dismiss filed by the Southern Electrical Retirement Fund. After hearing the argument of the respective counsel and after reviewing the summary plan description pertaining to Mr. Custer's benefits in the Southern Electrical Retirement Fund, the Court was of the opinion that the Qualified Domestic Relations Order was appropriate and must be complied with and obeyed by the Southern Electrical Retirement Fund. It is accordingly,

ORDERED, ADJUDGED AND DECREED AS Follows:

1. That the Southern Electrical Retirement Fund immediately disburse to Sylvia Custer, pursuant to the Qualified Domestic Relations

Order heretofore entered in this cause, the sum of Eleven Thousand, Two Hundred and Thirty-six and 55/100 Dollars (\$11,236.55), plus interest which has accrued since August 30, 1987.

2. The Southern Electrical Retirement Fund is hereby granted leave to seek an appeal from this Court's ruling.

ENTER this the _____ day of _____, 1987.

Judge Robert Summitt

APPROVED:

Michael E. Richardson
S. Del Fuston

* * *
(Filed February 1, 1988)
(TR 21)

KENNETH WAYNE CUSTER, * D-58541

Plaintiff,

vs.

SYLVIA ANGELA CUSTER,

Defendant.

* IN THE CIRCUIT COURT OF
* HAMILTON COUNTY TENNESSEE

* DIVISION I

ORDER

This cause came before this Honorable Court on the 1st day of February, 1988, upon the Motion for Reconsideration filed by the Southern Electrical Retirement Fund. Upon considering the arguments of respec-

tive counsel, and based upon the consideration of the entire record in this cause, the Court is of the opinion that the qualified domestic relations order heretofore entered by this Court is appropriate and must be immediately complied with and obeyed by the Southern Electrical Retirement Fund. It is accordingly,

ORDERED, ADJUDGED AND DECREED AS
FOLLOWS:

1. The Motion to Reconsider filed by Southern Electrical Retirement Fund is hereby overruled and the Southern Electrical Retirement Fund is ordered to immediately disburse to Sylvia Angela Custer, pursuant to the qualified domestic relations order heretofore entered in this cause, the sum of \$11,236.55, plus interest which has accrued since August 30, 1987, and judgement is accordingly nettered. There will be a Stay of Execution by agreement of the parties.

2. The Southern Electrical Retirement Fund is hereby granted leave to seek an appeal from this Court's ruling.

3. Court costs are assessed against the Southern Electrical Retirement Fund.

ENTER this the ____ day of _____, 1988.

Judge Robert Summit

APPROVED:
Michael E. Richardson
S. Del Fuston

USCOURT1/5/dg
7/2/89

No. 89-211

**IN THE
SUPREME COURT
OF THE UNITED STATES**

October Term, 1989

SOUTHERN ELECTRICAL RETIREMENT FUND, -

Petitioner,

v.

SYLVIA ANGELA CUSTER,

Respondent.

**RESPONSE IN OPPOSITION TO
PETITION FOR WRIT OF CERTIORARI
TO THE COURT OF APPEALS OF TENNESSEE
EASTERN SECTION**

PATRICK, BEARD & RICHARDSON, P.C.

Michael E. Richardson, Esq.
633 Chestnut St., Suite 1910
Chattanooga, Tennessee 37450

Attorneys for Respondent

FILED
SEP 29 1989
JOSEPH F. SPANIOL, JR.
CLERK

7 pp

QUESTION PRESENTED

The case at bar involves the interpretation of a property settlement agreement entered into between Kenneth Wayne Custer and his ex-wife and the Respondent in this case, Sylvia Angela Custer. The legal issue presented by the Petitioner, Southern Electrical Retirement Fund (hereinafter sometimes referred to as "S.E.R.F."), is whether or not S.E.R.F. has to comply with an order of the trial court and the provisions of ERISA set forth in 29 U.S.C. §1056(D)(ii).

The Circuit Court for Chattanooga, Hamilton County, Tennessee and the Court of Appeals for the Eastern Section of Tennessee have applied the statutory requirements as set forth in 29 U.S.C. §1056(D)(ii) and ordered pursuant to the Qualified Domestic Relations Order (hereinafter referred to as "QDRO").

PARTIES

The Petitioner, Southern Electrical Retirement Fund, is a large pension fund which covers electricians and is represented in the Petition for Writ of Certiorari by counsel, S. Del Fuston.

The Respondent, Sylvia Angela Custer, is the ex-wife of Kenneth Wayne Custer and is represented in this case by attorney, Michael E. Richardson.

ARGUMENT

As stated by the Petitioner, the Circuit Court for Hamilton County, Chattanooga, Tennessee, and the Court of Appeals for the Eastern District of Tennessee have unanimously held that contrary to S.E.R.F.'s argument, disbursement of Retirement Plan Funds to the Respondent, a non-participant spouse, in compliance with a QDRO is not contingent upon the age of the participant spouse at the time the funds are to be distributed. These Courts have unanimously held that since the Respondent's divorce decree was a "Qualified Domestic Relations Order" as defined by ERISA in 29 U.S.C. §1056(D)(3), the Respondent should be entitled to receive the fund awarded to her by the Court's decree and voluntarily entered into between the Respondent and the Respondent's ex-husband, "as if the participant (the Respondent's ex-husband) had retired on the date on which such payment is to begin. ..." 29 U.S.C. §1056(D)(3)(E)(I)(ii) (1985).

By adding Paragraph (3) to 29 U.S.C. §1056(d), Congress specifically provided that if an order requires payment of benefits to an alternative payee "as if the participant had retired on the date on which such payment is to begin under the order," it would meet the requirements of that clause.

As correctly pointed out by the Petitioner, the general rule relative to pension plans is that the participant's retirement benefits should not be subject to garnishment, levy or execution by some third party. However, the United States Congress set forth a specific exception to this general rule in passing into law the Retirement Equity Act of 1984, which is set forth in 29 U.S.C. §1056(D). This enactment specifically amended ERISA and pro-

vided for a QDRO.

Although S.E.R.F.'s Summary Plan description is subject to such a QDRO, the Respondent now seeks to limit the applicability of the Retirement Equity Act of 1984. On page 21 of S.E.R.F.'s Retirement Fund Summary Plan Description the following paragraph is found:

Benefits payable under the plan are not subject in any manner to sale, transfer, alienation, pledge or any other type of assignment of benefits, voluntary or involuntary, except by a Qualified Domestic Relations Order. A Qualified Domestic Relations Order is a judgement made under a state domestic relations law relating to the provision of child support, alimony payment, or marital property rights. In order to qualify as a Domestic Relations Order, a judgement is subject to other requirements regarding appropriate notification to the fund by the Court and the manner in which your benefits are assigned by the Court.

A review of 29 U.S.C. §1056(D)(ii) shows the following:

29 U.S.C. §1056(D)(ii). The earliest retirement age means the earlier of:

(i) the date on which the participant is entitled to a distribution under the plan or

(ii) the later of

a) the date the participant obtains age 50, or

b) the earliest date on which the participant could begin receiving benefits under the plan if the participant separated from service.

As previously recited by the Petitioner, the Circuit Court for Hamilton County, Chattanooga, Tennessee pursuant to the Property Settlement Agreement entered into between the Respondent and her ex-husband has adjudicated the Respondent to be an alternate payee or participant under the pension plan of her ex-husband. In fact, the Petitioner apparently concedes that the Respondent is in fact a participant under the Plan at issue, but merely argues what distribution date should be applied to this QDRO.

The Respondent avers that since the Respondent is a participant under the Plan, the provisions of 29 U.S.C. §1056 (D)(3)(E)(I)(ii) control, and the Respondent is entitled to immediate distribution under the QDRO previously approved by the Circuit Court.

A review of the applicable sections of ERISA show the clear language of such amendment to allow the Respondent to be entitled to distribution pursuant to the Circuit Court's judgment of such property settlement agreement to be a QDRO. A review of other state courts which have made a determination as to the proper distribution date under a QDRO are in complete agreement with the interpretation applied by the Court of Appeals for the Eastern District of Tennessee. In fact, the Petitioner has failed to set forth any case law in his Application for Writ of Certiorari which is in dispute with the interpretation applied by the Court of Appeals for the Eastern District of Tennessee.

A review of the legislative history of the Retirement Equity Act of 1984 'notes' that ERISA was amended by the Defendant to:

Provide for greater equity under private pension plans for workers and their spouses...by taking into account the changes in work patterns, the status of marriage and economic partnership, and a substantial contribution to the partnership of spouses who work both in and outside the home.

S. Rep. No. 575, 98 Cong. 2nd Sess. (1984), reprinted in 1984 U.S. Cong. N. Admin. News 2547. Such report stated specifically in direct conflict with the Petitioner's assertion that "the assignment of an alternate payee's rights to the (pension benefits) is not considered an assignment or alienation of benefits under a plan if and only if the order is a QDRO," and that state law providing these rights under a QDRO would be exempt from Federal preemption. Id. at 2565.

As previously determined by the Court of Appeals for the Eastern District of Tennessee and conceded by the Petitioner in its Application for Writ of Certiorari, the divorce judgment of the Respondent as entered into in July 1987, contained a QDRO that in every aspect fully complies with the requirements set forth in ERISA.

One of the uses of a QDRO is to enable a divorce court to equalize the equitable division of marital assets between spouses. The interpretation advanced by the petitioner would totally frustrate this use of a QDRO since it would put the non-participating spouse into a position where he or she would not be able to receive their share of this marital asset until possibly many years in the future.

Contrary to the petitioner's argument, disbursement


of retirement plan funds to a nonparticipant spouse in compliance with a QDRO is not contingent upon the age of the participant spouse at the time the funds are to be distributed. Since the Custers' divorce decree is a "Qualified Domestic Relations Order" as defined by ERISA in 29 U.S.C. §1056(d)(3), the wife may receive the fund awarded to her by the court's decree "as if the participant [Mr. Custer] had retired on the date on which such payment is to begin." 29 U.S.C. §1056(d)(3)(E)(i)(II) (1985).

CONCLUSION

For the foregoing reasons, the Respondent respectfully asserts that the Petitioner's Writ of Certiorari is without merit and should be dismissed with costs being assessed against the Petitioner.

Respectfully submitted,

PATRICK, BEARD & RICHARDSON, P.C.

By Michael E. Richardson
(Michael E. Richardson) 

Attorneys for Respondent
633 Chestnut Street, Suite 1910
Chattanooga, Tennessee 37450